No. 11908

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

INLAND EMPIRE PAPER COMPANY, a corporation,
Appellant,

vs.

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation,
Appellee.

Appellee's Answer Brief

Upon Appeal from the District Court of the United States for the Eastern District of Washington

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JURISDICTION

This action was brought by the Appellant Inland Empire Paper Company, a Washington Corporation, having its principal place of business in Spokane County, Washington, against the Appellee, The Hartford Steam Boiler Inspection and Insurance Company, a Connecticut Corporation, having its principal place of busines in Hartford, Connecticut. (Tr. 3, 35). The action was predicated upon a policy of insurance issued by the Appellee covering, among other things, a Sumner steam engine owned and operated by the Appellant. The amount of the recovery sought was $16,173.81, (Tr. 7, 8) no part of which claim was admitted, but all liability was denied by the Appellee. (Tr. 48). The amount in controversy was therefore $16,173.81.

The action was originally commenced in the Superior Court of the State of Washington in and for the County of Spokane (Tr. 2). Upon due notice and upon compliance with all terms of the statute, the case was properly removed to the District Court of the United States for the Eastern District of Washington, Northern Division (Tr. 34-44).

Jurisdiction of the District Court existed under Sec. 41, Subdivision (1), Title 28, U.S.C.A., Judicial Code, Section 24 amended; and under Sections 71 and 72, Title 28, U.S.C.A., Judicial Code, Sec.'s 28 and 29 (amended).

The appellants have appealed from the final judgment denying relief to plaintiff entered January 16, 1948. Notice of appeal was served upon attorneys for respondents and filed on March 15, 1948 and a copy of said notice was mailed to attorneys for defendant the same date. (Tr. 489).

Jurisdiction of the 9th Circuit Court of Appeals to review the case is believed to exist under Sec. 225, Title 28, U.S.C.A., Judicial Code, Section 128, (amended).

COUNTER STATEMENT OF THE CASE

On the 3rd day of July, 1946 there was in effect an insurance policy, Exhibits "A" and 18 herein, under the terms of which the defendant, Hartford Steam Boiler Inspection and Insurance Company, insured the plaintiff, Inland Empire Paper Company, against loss from an accident as defined in said policy to a Sumner steam engine located in the basement of the plaintiff's paper plant (Tr. 9) against loss on the property of the plaintiff directly damaged by such accident (Tr. 9) and against loss due to total prevention of business at said plant caused solely by an accident to said Sumner steam engine. (Tr. 23).

An accident is defined in the policy as "a sudden and accidental breaking, deforming, burning out or rupturing of the steam engine or any part thereof which manifests itself at the time of its occurrence by immediately preventing continued operation or by immediately impairing the functions of the steam

engine and which necessitates repair or replacement before its operation can be resumed or its functions restored, but the breaking, deforming, burning or rupturing of any gasket, gland packing or shaft seal or diaphragm shall not constitute an accident nor shall the depletion of the material in any part of the steam engine, due to pitting, corrosion or wear be construed as an accident." (Tr. 22-23).

The insured engine was attached by means of a belt to a system of pulleys, shafts and belts which carried the motive power of the engine up to a paper making machine on the floor directly over the Sumner steam engine. (Tr. 55-56). The insurance policy covered directly the engine and also covered parts of the paper making machinery, but did not cover directly the belting, line shafting and pulleys which carried this motive power from the engine to the paper machine. (Tr. 222-223).

On the 3rd day of July, 1946, while the Sumner steam engine was running at a normal speed making paper the Sumner steam engine, for some reason, increased its speed. None of the insured machinery was damaged in any way by this increase in speed, but the line shafting, belts and pulleys between the engine and the paper machine were damaged as alleged. The amount of damage to the plaintiff's property and the loss due to the interruption of its business is undisputed. The only dispute is as to the coverage.

In order for the plaintiff to recover anything, it was necessary, and the plaintiff has recognized that it was necessary, to prove, first, that there was an accident, as defined in the policy, to the steam engine and, second, that the line shafting pulleys and belt, which were uninsured, were directly damaged by such accident.

In order for the plaintiff to recover for its loss due to the prevention of business at the plant, it would be necessary for the plaintiff to show that the loss was caused "solely by an accident" to the Sumner steam engine.

There was no one in the basement near the steam engine at the time of the over-speed and there is no way of knowing positively what caused the over-speed. The sequence of events may be deduced only from circumstantial evidence, including the physical facts and the testimony of witnesses, which was consistent with those facts.

The vital facts are:

(1) That there are numerous possible causes for an over-speed of a Sumner steam engine. (Tr. 258, 260).

(2) That a belt driving the governor on the engine was found broken lying at the base of the machine after the accident. (Tr. 68-69).

(3) That after the accident, the Sumner steam engine came back down to an idling speed and continued at an idling speed for some

minutes until the steam was shut off some minutes later. (Tr. 216).

(4) That a Pickering governor stop which was designed to operate when the belt driving the Pickering governor broke, was so constructed that when it did operate, with no load on the engine, the engine was brought to an idling speed. (Tr. 354, 356, 288).

(5) That no other control or device on the engine would have the effect of bringing the engine to an idling speed when there was no load on the engine; (Tr. 451-452) and,

(6) After the line shaft, belts and pulleys were broken, and while the engine was observed idling at the conclusion of the sequence of events, there was no load on the Sumner steam engine. (Tr. 74, 154).

From this combination of circumstances the court concluded, and rightly, that the over-speed was from some unknown cause and that the over-speed continued until the governor belt broke, releasing the stop on the Pickering governor, thus bringing the engine back down to an idling speed.

In the trial court the plaintiff advanced the following theory: That the governor belt broke—that the Pickering governor stop which was supposed to operate upon the breaking of the governor belt failed to function and as a result the governor was opened and with nothing to counteract it, the engine continued to gain speed until the damage was done—that after the damage was done, the main drive belt tripped the trigger on the Brownell stop, released the butterfly

valve, allowed the weight on the butterfly valve to close the butterfly valve, thus bringing the engine down to an idling speed (Tr. 359-360).

SUMMARY OF ARGUMENT

The Appellee's argument in this case may be divided into four main sections.

Section one will show that the trial court committed no error in its rulings on admission and rejection of evidence during the trial.

Section two will show that the trial court correctly found that the plaintiff had failed to sustain the burden of proving that its damage was due to an accident within the purview of the insurance policy involved. The court's conclusion and the defendant's conclusion was and is that the plaintiff's theory as to the sequence of events and the cause of the overspeed of the Sumner steam engine was incredible and not consistent with the known undisputed facts and that the defendant's theory of the sequence of events was much more reasonable and probable.

The third section will show that the Trial Court correctly denied the appellant's motion for a new trial.

The fourth section of the argument will show that there was no accident within the purview of the policy, even if the breaking of the belt driving the governor occurred at the beginning of the overspeed of the engine, rather than at the end.

The fifth section will show that even assuming that the belt broke at the beginning of the sequence of events and that the breaking of the belt could be considered an accident, the breaking was not the direct cause of the damage.

ARGUMENT

I.

Appellant's assignment of errors numbers one, two and four with respect to the admission and rejection of evidence need be noted but briefly. Appellant cited but one case, that of *Lasityr v. Olympia,* 61 Wash. 652, 112 Pac. 752. This case, as do all cases on this subject, states the rule very clearly that the trial court is vested with a large discretion in determining preliminary questions of facts upon which the admissibility of experiments depends and the court in the case cited, where the trial court had rejected the evidence, stated on page 657:

> "While we are not prepared to say that it would have been error to admit proof of these experiments, we do not think that the quantity of light given out by an arc light at all times and under all conditions is so certain and unvarying as to render the ruling of the court erroneous, or manifest an abuse of sound judicial discretion."

In the present case the trial court admitted the evidence, and the appellants have not shown that there was any abuse of discretion in so doing, particularly in a case tried without a jury.

There is a wealth of authority on the subject of the admissibility of experimental evidence as affected by

similarity or dissimilarity of conditions collected in two notes, 8 A.L.R. 18 and 85 A.L.R. 479. With regard to a review in the Appellate Court the note in 85 A.L.R. summarizes the rule as follows: "In addition to the cases cited in the earlier annotation to the effect that the admission of evidence of experiments or permitting them to be performed in court, is a matter peculiarly within the discretion of the trial judge and that this discretion will not be interfered with unless it is apparent that it has been abused. The rule is supported by the following more recent decisions:"

85 A.L.R. 479, 482.

This rule is also cited in the case of *Lever Bros. Co. v. Atlas Assurance Company, Ltd., et al* 131 Fed. (2d) 770, 777. (Case cited by appellants on another point).

It should be pointed out, however, that Appellants have completely misconstrued the purpose of the experiments made on the Pickering governor in August. The admission of testimony with regard to those experiments had and could have had but one purpose and that purpose was to demonstrate that when the Pickering governor stop operates at a time when there is no load on the engine it does not completely stop the engine but reduces the speed of the engine to an

idling speed which was the condition of the engine when observed after the damage was done. This is of purely academic interest since this fact was definitely established by the Appellant's master mechanic. (Tr. 354, 356).

It should also be pointed out that counsel for the Appellant first made his objection to the evidence of the tests on the Butterfly valve after much evidence had already gone into the record concerning these tests. (Tr. 182, 183, 199, 304, 305).

Further, these tests were made jointly by representatives of the insurance company and employees of the Paper Company. There was no suggestion at that time that conditions were dissimilar or that they could more nearly simulate actual operating conditions. No testimony was offered at the trial that conditions were dissimilar—no testimony that the valve operates differently when it is cold than when it is hot—and no claim at the trial that removing the valve to inspect it and then replacing it in the line would affect its operation. It was definitely testified by Mr. Fullmer that an inspection of the valve showed that it was binding in the packing and would not close properly. (Tr. 301-303).

Appellant's third specification of error is also without merit. Prior to this offer of proof, Mr. Black, the Manager of the Appellant's company, had admitted that up to the time the insurance company denied liability the whole matter was in the discussion stage

and the decision was reserved as to whether or not the insurance company would assume this liability. Mr. Black also admitted that the first report of the Appellant company to the insurance company was that the belt had broken, causing the damage. It is also admitted that at the time the purported statements were made that the investigation had not been completed. (Tr. 238). It is not apparent whether appellant is urging this specification seriously or not. There is no authority cited as to why the opinion of these men would be relevent. The only reference made in appellants' brief is that such testimony would have shown the opinion of experts, even if not binding upon the insurance company. (App. Br. 31). Appellant had neither called nor qualified these men as experts nor has it shown that all the evidence was before the experts at the time they reportedly expressed their opinion.

Appellants also fail to urge very strenuously their specification of error No. 5. They cite no authority and give no grounds for the inadmissibility of the testimony. They merely quote the objection that was made at the time of the trial. The only valid objection possible would seem to be that it was hearsay. It was admitted on the basis that it was impeaching testimony. Mr. Wheeler, on direct examination, had testified that he didn't recall any circumstances where the paper machine had continued to operate fast enough to run the paper machine with the butterfly valve closed. He also testified that he didn't remem-

ber telling anyone from the Hartford Insurance Company that there were occasions where the paper machine had operated with the lever in a dropped position. (Tr. 181). The testimony objected to in specification 5 directly impeached the statements of this witness and it is clear from the court's remark cited in Appellant's brief (page 21) that this was the grounds on which the evidence was admitted and considered by the court.

Appellants' specification of error No. 6, that the district court had erred in rejecting testimony that part of the hand pull safety chain had broken can have no substance. This testimony was proffered after trial. It was not newly discovered evidence, and as a matter of fact the Appellants' counsel, in his arguments, indicate that he thought that he had put that evidence in during the trial. (Tr. 436). The trial court has wide range of discretion in admitting newly discovered evidence or further evidence in granting a new trial. As will be shown later in our arguments, under the Appellant's theory of the case during the trial, this evidence was irrelevant.

Appellant's specification No. 7 is also without merit. The expert witness put on the stand by appellant on cross examination stated definitely that there were many possible causes for an overspeed of a Sumner steam engine. (Tr. 258, 260). Some might be considered accidents and some might not be, but the appellant obviously didn't see fit to pursue the inquiry

further and allowed the testimony to remain in that state. The burden of proof being upon the plaintiff to show how the accident occurred, it would be the duty of th eplaintiff to show that the accident occurred in the manner claimed and not in some other manner. In fact, where there are many possible explanations for an occurrence the trier of the facts should not be permitted to speculate as to which of the possible causes is the true cause.

> *Fidelity & Cas. Co. of N. Y. v. Griner* (CCA-9) 44F (2d) 706.
>
> *Senn Products Corp. v. Hartford Steam Boiler Inspection & Insurance Company,* 41 N.Y.S. (2d) 133.

Specifications Nos. 8 through 11 are formal objections to the entry of the judgment and will be considered together in the course of the narrative argument.

II.

As was pointed out in the statement of the case, the plaintiff in the trial court advanced the following theory: That the governor belt broke, that the Pickering governor stop which was supposed to operate upon the breaking of the governor belt failed to function, and as a result the governor was opened and the engine continued to gain speed until the damage was done and after the damage was done the main drive belt flopped over and tripped the trigger on the Brownell stop, released the butterfly valve, allowed

the weight on the butterfly valve to close the butterfly valve, thus bringing the engine down to an idling speed.

In order to sustain their contention they would have to prove the following disputed propositions:

1. That the Pickering governor's stop had failed to function.
2. That when the men on the paper machine floor pulled the safety chain, the pin did not come out to release the butterfly valve.
3. That the Brownell stop failed to function when the engine reached the speed at which it was supposed to function.
4. That the driving belt danced around when it was released from the line shaft by the breaking up of the line shaft and pulleys, tripping the trigger on the Brownell stop, releasing the chain and allowing the butterfly valve to close.
5. That the effect of the butterfly valve closing would be to reduce the speed of the engine to idling speed at a time when admittedly there was no load on the engines since the pulleys and line shafting and belt which drove the paper machine were broken.

Actually it should be necessary only to disprove one of these propositions to disprove the plaintiff's entire case. If the Pickering governor valve had worked when the belt broke (assuming of course that the breaking of the belt started the sequence of events) there would have been no overspeed and no damage. If the pin which connected the chain from the Brownell stop to the butterfly valve had been pulled

out at the time that the workmen on the paper machine floor testified they pulled the pin, the butterfly valve would have closed at that time, rather than later when the dancing belt tripped the Brownell stop. Likewise, if the Brownell stop had operated at the time it reached the speed at which it was set, the Butterfly valve would have been closed at that time instead of later when the dancing belt knocked the trigger off the Brownell stop.

This is quite evident if we bear in mind the manner in which the butterfly valve and the apparatus attached to the butterfly valve worked. From Exhibit 8 it can be readily seen that the butterfly valve has attached to its hub one arm which, when the engine is in ordinary running condition, is horizontal and to the right of the hub of the valve. This is the weight attached to the butterfly valve which is frequently referred to and it is the only weight attached to the butterfly valve and the only motive force which can close the butterfly valve. Also attached to the hub of the butterfly valve is another arm which is pointed up and about 30 degrees to the left. Attached to this arm is the chain which holds the butterfly valve open and it is the only thing that counteracts the weight and holds the butterfly valve open. Whenever this chain is disconnected from the arm or whenever this chain is slack, the result is that the weight will drop down and close the butterfly valve. The pin which is attached to the safety hand pull which was also discussed at some length by the appellant is mere-

ly a connecting link between this chain and the arm on the butterfly valve. The chain, which is labelled No. 8, disappears from the exhibit in the lower left-hand corner. This is where the Brownell overspeed stop, discussed at some length, is located. The chain is there attached to a trigger arrangement which, when the Brownell stop operates through centrifugal force, releases the left end of the chain, slacks the chain, allows the weight, which is labelled No. 9, to drop, thus closing the butterfly valve. (Tr. 72).

The trial court found that it was highly unlikely that all of these things happened as claimed by the appellant and found as a matter of fact that it was most probable that none of these propositions was true. (Tr. 449-452). Appellants now ask the Circuit Court of Appeals to declare that this finding of fact by the Trial Court was "clearly erroneous." Rule 52 (a) Federal Rules of Civil Procedure. This case, like the case of *Wittmayer v. United States,* (CCA-9) 118 Fed. (2d) 808, is "pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses depends upon conflicting testimony or upon the credibility of the witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

> *Wittmayer v. United States,* (CCA-9), 118 Fed. (2d) 808, 811.

The findings of the trial court based on evidence taken in open court will not be reviewed by an Ap-

pellate Court, except for plain or obvious error.

> *Gila Water Co. v. International Finance Corp. et al* (CCA-9), 13 Fed. (2d) 1.
>
> *Graff v. Town of Seward, Alaska* (CCA-9), 20 Fed. (2d) 816.

To prove their first proposition that the Pickering governor stop had failed to function, appellants put on the testimony of two witnesses—Mr. Wheeler and Mr. Janecek. Each of these witnesses claim to have examined this Pickering governor stop after the accident and found that it had not operated. The credibility of their statements was considerably shaken by the fact that Mr. Wheeler waited a month and a half before reporting what he had seen in this respect (Tr. 227-228) and Mr. Janecek waited almost two years before he ever said anything about it (Tr. 229), although both the appellant's and appellee's representatives had sought the answer to that question continuously from the time of the accident until the time liability was denied by the insurance company. The trial court also disbelieved this testimony because it was the only device which was shown to be capable of reducing the speed of the engine to an idling speed at the conclusion of the damage and that was unquestionably the condition of the engine at that time. The only witness who came forward at once with information on this subject was Mr. Beguelin, who arrived at 4:30 in the afternoon and noticed at that time that the device was tripped. (Tr. 196). All employees had been given orders not to touch anything. (Tr. 231-232).

Further, there was testimony by the same Mr. Wheeler that the day before the accident he had tripped the Pickering governor stop and it had operated properly. (Tr. 171-172). There is also testimony by Mr. Janecek and by the first representative of the insurance company to arrive at the plant, Mr. Olinger, that when Mr. Olinger first arrived he and Mr. Janecek tested the Pickering governor stop four or five times and it operated each time. (Tr. 140, 270, 271). It was not until a half an hour or more after this that it was first discovered that the Pickering governor stop would not work. (Tr. 276). To make this contention of the plaintiffs at all credible, one would have to assume that the Pickering governor worked and then at the crucial time when the accident occurred it did not work, then following the accident it worked four or five times then a half an hour later it did not work again and didn't work again until they tightened the set screw. Since the reason for the Pickering governor stop not having worked was supposedly a loose set screw it also must be assumed that the screw was tight and it loosened itself, then it tightened itself, and then loosened itself again. (Tr. 372, 374).

In its brief, page 41, Appellant places great reliance upon the testimony of its expert witness, Mr. MacAmy, who testified to the effect that the Pickering governor stop would close the steam off tight and stop the engine rather than allow it to idle. (App. Br. 41). Mr. MacAmy testified that he was merely

familiar with the Summer steam engine in a "general way." (Tr. 243). He also testified that he had never conducted any tests on any of this equipment or examined it personally. (Tr. 256). On further cross-examination he also admitted that it was often customary to equip stops so that they did not slam the engine completely off, but could be fashioned so that the stop device merely allowed the engine to come down to an idling speed (Tr. 256) and finally he admitted that he did not know what the condition of the automatic stop on the governor was at the Inland Empire Paper plant. (Tr. 257).

Both Mr. Olinger, Inspector for the Insurance Company and Mr. Beguelin, master mechanic for the Paper Company, testified that the Pickering governor stop was designed to permit some steam to pass through when it was closed and thus allow the engine to idle. (Tr. 288, 357). This was also proved by the tests conducted on August 3, 1948 at which time the Pickering governor stop was operated and it brought the engine to an idling speed. (Tr. 315, 316, 332, 348).

The appellants also seek to sustain their proposition No. 2 that when the men on the paper machine floor pulled the safety chain the pin did not come out and release the butterfly valve by the testimony of Mr. Janecek and Mr. Wheeler, and by an affidavit presented after the trial. Disregarding the affidavit for the time, the story that the pin had not pulled out was completely inconsistent with the story of the men on the second floor that they had pulled the chain a

foot or a foot and one-half up from the floor (Tr. 78, 81, 91) and the undoubted fact, testified to by Mr. Janecek and apparent in the exhibits that there is little or no slack in that chain (Tr. 134). It takes but a casual glance at Exhibit No. 8 to see that that chain could not come up a foot or a foot and one-half without coming out of its socket or without breaking something. There is no claim that the chain was broken. In addition, the report of the appellant to the respondent insurance company was to the effect that the first witness to see this pin was Mr. Coy, their engineer, and he had observed that this pin was pulled out. (Exhibit 13, Tr. 205). Appellants seek to escape the almost inescapable physical facts by presenting an affidavit that the arm on the butterfly valve was broken. Of course, it is difficult to conceive of this as being newly discovered evidence when the affiant was on the witness stand and had testified at the trial. However, the trial court rejected this evidence on the basis primarily that it was completely immaterial and irrelevant. As a matter of fact, it is more than immaterial and irrelevant, it completely shatters the appellant's entire case. If the arms of the butterfly valve are examined in Exhibit 8, it can be seen that if the chain pulled up a foot or a foot and one-half and pulled the arm off the butterfly valve, one of two things must have happened. If merely the arm attached to the chain were pulled off, it would allow the weight to drop and the butterfly valve would have been closed at that time as effectively as if the pin had pulled out of its socket. If

the pull broke off both arms there would be nothing left to close the butterfly valve and the butterfly valve would be even more effectively eliminated from the picture than under the appellee's view of the case. If the butterfly valve is thus eliminated, there is clearly nothing left to bring the engine down to an idling speed except the Pickering governor stop.

Incidentally, Mr. Wheeler testified that when he saw the engine after the damage, the butterfly weight was hanging down and from its outward appearance it was closed. (Tr. 181). It should also be pointed out that Mr. Beguelin's affidavit does not state when, after the accident, he found this arm broken.

The appellant has offered no evidence in support of its proposition No. 3 to the effect that the Brownell stop failed to function. There is no evidence as to why it would not function or any possible way in which it could fail to function. It is a very simple device which the trial court said that even a person with no mechanical ability could understand. (Tr. 450). It operates by means of centrifugal force pushing against a spring. There was much testimony as to tests conducted on it, both before and after the damage, and every test that was conducted on it demonstrated that it was in operating condition. (Tr. 451). No explanation was offered as to how or why the Brownell stop could have failed to function.

There seems to be some contention that if the Brownell stop or the hand chain had operated, the

engine, operating with a load on it, would not have reached a speed that would cause damage. However, it was testified that when the overspeed first commenced, at least two of the operators immediately disengaged clutches which threw some of the load off the engine. How much of the load was disconnected is perhaps conjectural, but it is established that the full load was not on the engine at the time of the breakup of the shaft and pulleys. (Tr. 81, 83, 111, 113, 114, 115).

Appellant seeks to establish proposition No. 4 that the driving belt bounced around when it was released from the line shaft by the breaking up of the line shaft and pulleys, tripping the trigger on the Brownell stop, releasing the chain, allowing the butterfly valve to close merely by expert testimony that this could happen. This is, of course, pure speculation.

One of the most vital points, however, of the entire case is proposition No. 5, that the effect of the closing of the butterfly valve would be to reduce the speed of the engine to idling speed at a time when admittedly there was no load on the engines since the pulleys and line shafting and belts which drove the paper machine were broken (Tr. 154). Appellants in attempting to establish this point on rebuttal called Mr. Beguelin, their master mechanic, and asked him what the effect of the closing of the butterfly valve would be on the engine when it was operating with paper machine running and in operation,—in other words with a full

load on it. He answered that it would continue to run at less than a dangerous speed. On cross examination he was asked the following question: (Tr. 357)

> "Q. Without a load on it the engine would continue to gain speed?
>
> "A. It takes very little steam to operate that engine with no load on it."

It is obvious from the entire examination and cross-examination on rebuttal (Tr. P. 351 to 357) that Mr. Beguelin was in a very tight spot, with the interests of his employer balanced against his natural honesty. When the crucial question was put to him his natural honesty prevailed and he in effect admitted that without a load on the engine the engine would increase in speed with the butterfly valve closed.

How counsel for appellant can twist the words around and make them read backwards is very difficult to understand. Page 34 of his brief states that master mechanic Beguelin testified that the butterfly valve would bring the engine to at least an idling speed with all the load on (the words "idling speed with all the load on" in italics). In his next statement he says that it operated to bring the engine to an idling speed, even when there was no load on the engine. There was no such evidence presented and it is obvious that it will take less steam to operate an engine with no load on it than with a load on it. If there is any question on this, the testimony of Mr. Beguelin cited above bears this out, and Mr. Fulmer testified to the effect that the valve was binding in its packing and would

not close tightly enough to slow the engine down when it was operating without a load. (Tr. 301-303). This was substantiated by the tests conducted a few days after the accident when the representatives of the insurance company first arrived and were in a position to conduct tests. (Tr. 182-183, 199, 304-305, 327-330). Appellant's objection to the admission of these tests has been fully discussed. In so far as his objections might be construed as going to the weight to be accorded these tests, it should be pointed out that appellants made no showing why the taking of the butterfly valve out of the line, inspecting it and putting it back in the line, would make the tests essentially different from the conditions operating before. There is mentioned some sort of a theory that the pipes were not hot and that the butterfly valve would operate differently after the engine was warmed up, but there is no testimony or no evidence of any kind to support this contention.

It is undisputed that there were only three control devices, the Pickering governor stop, the handpull safety chain, and the Brownell stop. (App. Br. 5). Both the handpull safety chain and the Brownell stop merely operated to close the butterfly valve. (Tr. 70, 72).

The only other way that the engine could be in any way controlled was by manually shutting off the steam supply. At this stage of the proceedings it is difficult to tell whether or not the appellants have

abandoned their first theory and have adopted a new theory. On page 34 of this brief they make some point of the fact that the Butterfly valve brought the engine to an idling speed. Again, on page 42 they state "What brought the insured engine to a final stop was the shutting off of the steam on the main line within a few seconds of the breakup after the runaway speed by the engineer who was present." Of course the trial court inspected the premises (Tr. 51) and from an inspection of the premises it is obvious that it would take the engineer more than a few seconds to do what he claimed he did. Also the testimony of both Mr. Janecek and Mr. Black was that it was idling when they arrived at the scene. It is obvious from their description of where they were and where they had to go that it was more than a few seconds after the breakup that the steam was finally shut off. The testimony of Mr. Black establishes that it was at least ten or fifteen minutes after the breakup when the steam was shut off. (Tr. 69, 216).

There now also seems to be some intimation that the breaking of the butterfly valve could be the "accident" which would result in liability (App. Br. 36). There was of course no evidence of this properly before the trial court and as pointed out such position is entirely inconsistent with appellant's theory of the case.

Appellant also states that the trial court decided the case on a different theory than the Insurance

Company advanced (App. Br. 36). This statement has no foundation in fact. As may be seen by reading Appellee's argument to the court, the court adopted fully Appellee's version of the case. (Tr. 388-414).

In any event, there is clearly ample evidence to support the trial court's conclusion that the Pickering governor stop was the only thing that could bring the engine to an idling speed which was unquestionably the condition of the engine after the damage was done and if the Pickering governor stop had functioned, the belt must have broken after the damage was done rather than the breaking of the belt being the cause of the damage.

III.

APPELLANT'S MOTION FOR A NEW TRIAL

At the conclusion of the trial, after entry of the judgment, the plaintiff made an alternative motion for a new trial, based upon all statutory grounds. (Tr. 469-470). The motion was argued and denied. (Tr. 485-486). The alleged errors of law have already been discussed. The only additional grounds for this motion were accident or surprise, which ordinary prudence could not have guarded against, or newly discovered evidence, material for the parties making the application, which they could not with reasonable diligence have discovered and produced at the trial. Attached to the motion was an affidavit of plaintiff's master mechanic, Fred Beguelin. (Tr. 471, 472).

He was present at the trial and testified both on plaintiff's original case and on rebuttal. There is nothing in the affidavit showing that this information had not been divulged to plaintiff's counsel prior to the trial and no excuse shown in the record for failure to offer it at the trial if it was of any material value. Therefore in no sense can it be considered accident or surprise or newly discovered evidence. Further, there is nothing in the affidavit to show when Mr. Beguelin discovered the break in the butterfly valve arm—whether it was immediately after the accident or some considerable time after. It is reasonable to assume that plaintiff did not present this evidence at the trial because if the facts as alleged were true, it would have been inconsistent with plaintiff's theory of the case. If the hand pull safety chain was violently pulled by the men on the floor above so that the lever arm was broken, this breaking would have the same effect as the pulling of the pin, by releasing the tension on the lever arm causing the weight arm to close the butterfly valve.

The granting of a new trial upon the basis of accident, surprise or newly discovered evidence is a matter peculiarly within the discretion of the Trial Court and his determination will not be disturbed unless there is an obvious abuse of this discretion.

Spokane & I.E.R. Company v. Campbell, 217 Fed. 518, 133 CCA-370, affirmed 36 Sup. Ct. 683, 241 U. S. 497, 60 L.ed. 1125;

King v. Leech, 131 Fed. (2d) 8;

Roach v. Stastny, 104 Fed. (2d) 559;
Cheeney v. Nebraska & C. Stone Co., 41 Fed. 740.

The affidavit seems to have been presented merely to substantiate testimony that the pin had not been pulled. If presented for this purpose it would be merely cumulative. A new trial should also be denied where the effect of the newly discovered evidence is merely cumulative.

Viles v. Prudential Ins. Co. of America, 107 Fed. (2d) 696; Cirt. denied 60 Sup. Ct. 387, 308 U. S. 626, 84 L.ed. 523. Rehearing den. 60 Sup. Ct. 582, 309 U. S. 695, 84 L.ed. 1035. Motion den. 61 Sup. Ct. 53, 311 U. S. 723, 85 L.ed. 471.

IV.

THE BREAKING OF THE BELT DID NOT CONSTITUTE AN ACCIDENT

Although there is little room for doubt that the Trial Court correctly decided this case on the basis that the plaintiff did not prove that the breaking of the belt was the first event in the series of events, nevertheless it is felt that it should be pointed out that even if it did sustain its contention that the breaking of the belt was the cause of the damage, it would still not be entitled to recover.

The insurance policy involved covered only damage to the plaintiff's property which was caused by an accident to the insured object, the Sumner Steam Engine. Was the breaking of a leather belt an acci-

dent within the terms of the policy? The policy defining an accident states that an accident is a "sudden and *accidental* breaking, deforming, burning out, or rupturing of the steam engine or any part thereof. First, it would thus be necessary to show that the breaking of the belt was accidental. The word "accident" has been defined many times, not only in dictionaries but in numerous cases. While there are various combinations of words used in defining "accident," every definition of "accident" has in it the elements of unexpectedness—something that is unforeseen. The leading case is *United States Mutual Accident Association v. Barry,* 131 U. S. 100, 121, 33 L.ed. 60, 67, where the following instructions were approved:

> "That the term 'accidental' was used in the policy in its ordinary popular sense as meaning happening by chance; unexpectedly taking place; not occurring in the usual course of things; or not as expected; that if a result is such as follows from ordinary means, voluntarily applied, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means."

This case was followed and part of the above language was quoted in the case of *Zurich General Accident and Liability Insurance Company v. Flickinger,* 33 Fed. (2d) 853, 854, 68 A.L.R. 161.

This same rule is followed in a fairly recent Washington case, *Hodges v. Mutual Benefit etc. Association,* 15 Wash. (2d) 699, 131 Pacific (2d) 937, where the Court states that

> "An examination of all of our cases upon this subject demonstrates that an unusual, unforeseen agency or happening was present and unexpectedly caused the injury which brought each of these cases within the provisions of the policy of insurance."

See also:

Ocean Accident and Guarantee Corporation v. Penick and Ford, 101 Fed. (2d) 493, 497;

Senn Products Corporation v. Hartford Steam Boiler Inspection & Insurance Co., 41 New York Supp. (2d) 133, 136;

Travelers' Indemnity Co. of Hartford, Conn. v. M. Werk Co., 33 Ohio App. 358, 169 N.E. 584.

If we examine the evidence presented in this case, we find that the breaking of this particular belt was neither unforseen nor unexpected. It was a usual occurrence. Appellant's witnesses testified that they had a number of these belts hanging on the wall; that very frequently they took them down and changed them around, put them back on and took them off. They testified that the belt very frequently wore out and broke and that when this happened, they merely took another belt off the wall and put it on the machine. (Tr. 174, 224). Thus the belt is what might be considered an expendable part of the engine rather than a normally permanent one.

It may be compared to an automobile tire. When one runs an automobile for so many thousand miles the tire wears down to the cords and then the tire gives way and blows out, and no one considers the blowing of the tire an accident. It is true under certain circumstances the car might proceed to have an accident, but the blowing of the tire would be no accident—it is something that is foreseen and expected.

The policy and definition of "accident" further provides "nor shall the depletion of material on any part of the object due to pitting, corrosion or wear be construed as an accident." In this case the belt undoubtedly wore down, was depleted, and finally broke as would be expected.

There is no direct evidence as to the age of the belt. A small piece of the belt is in evidence as defendant's exhibit No. 12. If it should become important the trial court should, of course, make a finding of fact with respect to the age of the belt.

To keep clearly in mind the nature of the Appellant's claim it is necessary to divorce the effects from the event which is claimed to be an accident. It is true, when you get a lot of breaking up of shafts and pulleys and some $16,000 worth of damage, you consider that there has been an accident. But the accident has been to the pulleys and shafts. The company does not insure against an accident to the pulleys and shafts. If we assume that the pulleys and shafts had not broken and had not been damaged, and all

that had happened was the breaking of the governor belt, no ordinary man would have said that this engine was involved in an accident merely because the governor belt broke. It is highly doubtful that the Paper Company would have considered putting in a claim for the broken belt. There is no evidence that they had ever put in a claim for any belts that were broken prior to this.

V.

THE BREAKING OF THE BELT IF IT WAS THE INITIAL EVENT WAS NOT THE DIRECT CAUSE OF THE DAMAGE

Appellant has still another hurdle to get over before it is entitled to recover. Assuming that the breaking of the belt was the initial event, and that such breaking was an accident, within the meaning of the policy, still the appellant must establish that the damage was the direct result of the breaking of the belt. The policy provides that the defendant will pay "the assured for loss on the property of the assured directly damaged by such accident" and excludes "loss from any indirect result of an accident" (Tr. 9). The courts have construed the language "directly damaged" as synonymous with "proximately caused." In *Dixie Pine Products Company v. Maryland Casualty Company,* 133 Fed. (2d) 583, 585, court said:

> "It is well settled that the words 'direct cause' ordinarily are synonymous in legal intendment with 'proximate cause,' a rule applicable to

causes involving the construction of an insurance policy."

There are innumerable definitions of proximate cause in the cases and it would be futile to attempt to cite them all. We call the court's attention, however, to a few. *Cole v. German Savings and Loan Society,* 124 Fed. 113, 115, court said:

> "An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. A natural consequence of an act is the consequence which ordinarily follows it—the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. *Chicago, St. P., M. & O. Ry. Co. v. Elliott,* 55 Fed. 949, 952, 5 CCA 347, 350, 20 L.R.A. 582; *Railway Co. v. Kellogg,* 94 U. S. 469, 475, 24 L.ed. 256; *Hoag v. Railroad Co.,* 85 Pa. 293, 298, 299, 27 An. Rep. 653."

In *Union Pacific Ry. Company v. Callaghan,* 56 Fed. 988, 993, court said:

> "The independent intervening cause that will prevent a recovery on account of the act or omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that could not have been reasonably anticipated."

The Supreme Court of North Carolina said in *Clark v. Wilmington, etc., Railroad Company,* 14 S.E. 43, 47:

> "If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote."

The Supreme Court of the United States declares:

> "The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" *Railway Company v. Kellogg,* 94 U. S. 469, 475, 24 L.ed. 256.

And again:

> "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones." *Aetna Insurance Company v. Boon,* 95 U. S.117, 130, 24 L.ed. 395.

The Circuit Court of Appeals for the Seventh Circuit holds that:

> "The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof * * * The causal connection between the negligence and the hurt is interrupted by the interposition of an independent human agency; and, as Mr. Wharton expresses the thought, 'the intervener acts as a non-conductor, and insulates the negligence.' The test is: Was the intervening efficient cause a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation, although it may have remotely contributed to the injury as an occasion or condition?" *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 405, 11 CCA 253, 258, 27 L.R.A. 583.

There is also a very carefully reasoned article in the Harvard Law Review, Vol. XXXIII, p. 633, entitled "Proximate Consequences of an Act." The gist of the article, as it applies to this situation, is found in the following two excerpts:

> "On the other hand, where defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from the defendant's act." P. 651.
>
> "The form of rule above stated is believed really to state the true distinction and the one actually enforced by the courts. * * * A more accurate phrase which is gaining in use is that the intervening force, unless it is to make the result remote, must be foreseeable." P. 652.

Applying these rules to the situation here involved, according to appellant's theory, we find the following: When the belt breaks, the rider pulley drops and the trigger pin is hit. That force is carried up to the ratchet spring and the safety device is operated. In other words, when the belt breaks, it sets in motion a force which causes the safety device to operate and shuts off the steam. This is the foreseeable and intended chain of events which would normally ensue. Appellant contends, however, that in this instance this normal chain of events did not ensue, but rather that the Pickering stop failed to function and the engine ran away instead of stopping. This, it says, was due to the fact that a set screw on the trigger arm was or had become loosened so that it slipped instead of turning and releasing the ratchet spring. This screw required frequent inspection and tightening. Appellant's engineer, Wheeler, testified as follows:

> "Q. (By Mr. Paine): That screw could be loosened by applying a wrench to it and loosening it up?
>
> A. Certainly.
>
> Q. Do you think it could be loosened by mere operation of the machine itself?
>
> A. Vibration; there's a certain amount of vibration on those high speed engines.
>
> Q. And do you go around frequently and tighten it up, keep it tight?
>
> A. Well, probably not as often as we should have. I'll admit that on my own part, but those machines are in continuous operation 24 hours a day and a good deal of the time seven days a week.

Q. And they require a constant tightening of that screw; it should be kept tight?

A. There's lots of things that require tightening, and we do tighten them, absolutely, where it has to be done, absolutely necessary." (Tr. 180-181).

The appellee's contention is that if appellant's theory is correct, then the direct cause of the engine running away and damaging the property was the failure of the Pickering device to operate due to the loose set screw which was caused by faulty maintenance and not by the breaking of the belt. The only foreseeable result in the breaking of the belt would be the stopping of the engine, but due to the interference of the loose set screw, the result did not follow from the initial force, but an entirely different result was brought about. To-wit: the over-speeding of the engine, but that was proximately caused by the loose set screw, a thing that was not covered by the policy of insurance.

In presenting this argument, we do not want to be understood as intimating that we believe this is what happened, but only wish to point out that even under appellant's theory, no set of facts has been shown that justifies recovery under the policy.

CONCLUSION

As has been pointed out previously in this brief, this case presents solely a question of facts. The trial court made its finding based upon the evidence taken

in open court which consisted of testimony of witnesses, as to what they had seen and observed, and certain physical facts and conditions. A good part of the testimony depended upon the interest, honesty and credibility of the witnesses, and in such case the findings of the Trial Court cannot be disturbed unless clearly erroneous. We respectfully urge that the findings of the Court, far from being clearly erroneous, were sustained by the overwhelming weight of the evidence and were the only ones which could have been entered. It was undisputed that the Sumner Steam Engine came down to an idling speed before the steam was shut off; that there were only two devices which could accomplish this—either the butterfly valve or the Pickering safety stop. If the Pickering Safety Stop was the device that caused the engine to come down to an idling speed, then it must have operated at the end of the sequence of events and would not be a direct cause of the damage, but would in fact be the thing that stopped the damage from being greater than it was. The Court properly found this to be what happened. The evidence showed clearly that the butterfly valve failed to close due to an inherent defect in the butterfly valve itself. The two devices, namely the hand pull chain and the Brownell stop, which were designed to cause the butterfly valve to close, must both have functioned, as there was undisputed testimony that the hand lever was pulled and no possible reason or theory was advanced as to why the Brownell stop would not have operated when the fly wheel attained the speed which it did.

The Court also did not err in admitting the testimony objected to, as this evidence constituted the examination of certain physical objects, which was entirely proper and the conducting of tests upon them by both parties to the action under similar conditions. Testimony as to the tests had also previously been given by the plaintiff's own witnesses without objection on the part of the plaintiff. Further, we believe that even if the Trial Court's findings of fact were erroneous, the plaintiff would not have been entitled to a judgment because the breaking of the belt was neither an accident within the meaning of the policy or, if it were such an accident, it was not the direct cause of the damage. For these reasons we respectfully urge that the judgment of the Trial Court is correct and should be affirmed.

Respectfully submitted,

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